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CMS Clinker Sdn Bhd v Allianz General Insurance Co (M) Bhd

COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO Q-02–2289–09 OF 2012
AZAHAR MOHAMED, DAVID WONG AND ABANG ISKANDAR JJCA
15 MAY 2014

Insurance — Marine insurance — Damage to goods — Shipment of steam bulk coals — Survey report before voyage and after voyage yielded different metric tonnes — Complaint that coal became useless — Differences of report — Which was superior than the other — Claim for damages

The appellant took out an insurance policy in respect of a shipment of 7,350,615 metric tonnes of steam bulk coal for a voyage from Indonesia to Kuching for an insured amount of USD792,000. Clause 1 of the policy provided for all risks of loss or damage to the coal. Prior to the shipment from Indonesia, a survey report was commissioned and the report confirmed that the quality of the coal complied with the specification of the purchase order and that the quantity was 7,350,615 metric tonnes. Another survey was conducted upon arrival in Kuching which stated that the quality and quantity of the coal were different from the report in Indonesia and hence did not comply with the specification of the purchase order. The aforesaid report was done by SGS (M) Sdn Bhd ('SGS'). Subsequently, the coal had become useless for use to the appellant in that the quality of the coal that had arrived in Kuching was inferior than the specifications stated in the purchase order. The appellant lodged a police report of the variance of the two commissioned reports. The appellant also informed the respondent of the differences of the two reports and also made the claim on the policy. SGS was also informed of the differences. The respondent commissioned another surveyor ('Kasi'). The appellant attempted to mitigate the damage by using the coal through mixing the same with other high grade coals but however did not work in that the fuel did not produce enough heat to cook the raw materials. The appellant expended an amount of RM957,713.02 through this attempt to utilise the low grade coal. The High Court dismissed the appellant's claim and this appeal concerned that dismissal.

Held, allowing the appeal:

(1) The appellant had discharged the burden of proof. The comparative analysis performed by SGS, were wrongly rejected by the judge. The judge erred on this rejection as he failed to acknowledge that PW2's evidence was consistent to that of the reports of SGS, which have not been rebutted by the respondent. PW2's evidence was rejected by the

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judge on the ground that he had no academic qualification. That, was incorrect as a witness could attain their expertise through his or her experience in that area of expertise. PW2 was a coal mine developer and an international coal trader for some 16 years in Indonesia and Australia (see para 25).

(2) It was undisputed that the comparative report of SGS and its earlier report on the coal show conclusively that there was a change in the quality of the coal. This change in quality, and in the absence of any allegations of bad faith or fraud against the appellant in their claim by the respondent was enough to show that the loss had been caused by a fortuitous event and/or casualty and/or accident. Hence, the appellant had discharged the burden of proof and with that, the burden then shifted to the respondent to prove that the change in the quality of coal was due to 'inherent vice' of the coals. The appellant had proven their case and to escape liability, the respondent who had asserted that the coal's deterioration was due to 'inherent vice' must bear that burden of proof to so prove, as required under the law (see paras 26–27).

(3) The respondent's witness was not an expert on coal and was only an insurance adjuster. The respondent had not produced any evidence to prove their case. The appellant had successfully proved their claim on a balance of probability and was entitled to compensation due under the insurance policy (see paras 27–28).

(4) The appellant bore the primary burden of proving their case that the loss of the coal was due to a fortuitous event and/or accident and/or casualty. The appellant did that by proving that the quality of the coal was not the same as when the coal was boarded in Indonesia. Once proven that burden shifted for the respondent to prove that there was 'inherent vice' in the coal. That, the respondent failed to discharge the onus was on the judge (see para 31).

[Bahasa Malaysia summary

Perayu mengambil polisi insurans berkaitan penghantaran 7,350,615 tan metriks *steam bulk coal* untuk pelayaran dari Indonesia ke Kuching untuk jumlah yang diinsuranskan sebanyak USD792,000. Klausa 1 polisi memperuntukkan untuk kesemua risiko kerugian atau ganti rugi kepada arang batu tersebut. Sebelum penghantaran dari Indonesia, laporan kajian dibuat dan laporan mengesahkan bahawa kualiti arang batu mematuhi spesifikasi pesanan belian dan bahawa kuantiti adalah sebanyak 7,350,615 tan metriks. Satu lagi kajian dijalankan apabila tiba di Kuching yang menyatakan kualiti dan kuantiti arang batu adalah berbeza daripada laporan yang dibuat di Indonesia dan maka tidak mematuhi spesifikasi pesanan belian. Laporan tersebut dilakukan oleh SGS (M) Sdn Bhd ('SGS'). Akhirya, arang batu menjadi tidak berguna untuk digunakan oleh perayu kerana kualiti arang batu

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yang tiba di Kuching kurang baik mutunya daripada spesifikasi yang dinyatakan di dalam pesanan belian. Perayu membuat laporan polis mengenai variansi dua laporan yang dibuat. Perayu juga memberitahu responden mengenai perbezaan kedua-dua laporan dan juga membuat tuntutan ke atas polisi. SGS juga diberitahu mengenai perbezaan-perbezaan tersebut. Responden melantik seorang lagi penilai ('Kasi'). Perayu mencuba untuk meringankan ganti rugi dengan menggunakan arang batu dengan mencampurkannya dengan arang batu yang gred lebih tinggi tetapi walau bagaimanpun ia tidak berhasil di mana bahan api tidak menghasilkan panas yang mencukupi untuk memasak bahan mentah. Perayu membelanjakan sejumlah RM957,713.02 melalui percubaan ini untuk menggunakan arang batu yang bergred rendah tersebut. Mahkamah Tinggi menolak tuntutan perayu dan rayuan ini adalah berkaitan penolakan tersebut.

Diputuskan, membenarkan rayuan:

(1) Perayu telah melepaskan beban pembuktian. Analisis perbandingan yang dilakukan oleh SGS, ditolak dengan salah oleh hakim. Hakim terkhilaf atas penolakan itu kerana dia gagal untuk menerima bahawa keterangan PW2 adalah konsisten dengan laporan SGS, yang mana telah dipatahkan oleh responden. Keterangan PW2 ditolak oleh hakim atas alasan bahawa dia tidak mempunyai kelayakan akademik. Ini adalah salah kerana saksi boleh mendapatkan kemahiran mereka melalui pengalamannya dalam sesuatu bidang yang diceburinya. PW2 adalah pemaju lombong arang batu dan peniaga arang batu antarabangsa selama lebih kurang 16 tahun di Indonesia dan Australia (lihat perenggan 25).

(2) Ia tidak dapat dipertikaikan bahawa laporan perbandingan SGS dan laporan awalnya ke atas arang batu menunjukkan secara konklusif bahawa terdapat perubahan dalam kualiti arang batu. Perubahan kualiti ini, dan dalan ketiadaan apa-apa dakwaan niat jahat atau fraud terhadap perayu dalam tuntutan mereka oleh responden cukup untuk menunjukkan bahawa kerugian telah disebabkan oleh kejadian secara kebetulan dan/atau kemalangan dan/atau nahas. Maka, perayu telah melepaskan beban pembuktian dan dengan itu, beban berpindah kepada responden untuk membuktikan bahawa perubahan dalam kualiti arang batu adalah akibat kepada 'inherent vice' arang batu. Perayu telah membuktikan kes mereka dan untuk terlepas daripada liabiliti, responden yang menegaskan bahawa kemerosotan arang batu adalah akibat 'inherent vice' mesti memikul beban pembuktian untuk membuktikan, seperti yang dikehendaki di bawah undang-undang (lihat perenggan 26–27).

(3) Saksi responden bukan pakar arang batu dan hanya seorang adjuster insurans. Responden tidak mengemukakan apa-apa keterangan untuk membuktikan kes mereka. Perayu telah berjaya membuktikan tuntutan

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mereka atas imbangan kebarangkalian dan berhak kepada pampasan yang kena dibayar di bawah polisi insurans (lihat perenggan 27–28).

(4) Perayu memikul beban utama membuktikan kes mereka bahawa kerugian arang batu adalah akibat daripada kejadian secara kebetulan dan/atau kemalangan dan/atau nahas. Perayu berbuat sedemikian dengan membuktikan bahawa kualiti arang batu tidak sama seperti semasa ia dipunggah naik kapal di Indonesia. Sebaik saja dibuktikan beban berpindah kepada responden untuk membuktikan bahawa terdapat 'inherent vice' dalam arang batu. Kegagalan responden untuk melepaskan beban pembuktian adalah ke atas hakim (lihat perenggan 31).]

Notes

For cases on damage to goods, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 254–255.

Cases referred to

British and Foreign Marine Insurance Co v Gaunt [1921] All ER Rep 447, HL (folld)

PP v Muhamad Sulaiman [1982] CLJ (Rep) 292, FC (refd)

Appeal from: Civil Trial No KCH-22–59 of 2011 (High Court, Kuching)

Leonard Shim (Nicholas Wung with him) (Reddi & Co Advocates) for the appellant.

Cecil Ha (Raymond Tajem with him) (Ibrahim & Co) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant/plaintiff against the decision of the High Court in which the learned judge dismissed a marine insurance claim against the respondent/defendant for loss of cargoes damaged during the voyage from Indonesia to Sarawak.

[2] We heard the appeal and after giving due consideration to the evidence adduced in the trial court and submissions by respective counsel, we allowed the appeal and now give our grounds for that decision.

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A BACKGROUND FACTS

[3] The appellant took out an insurance policy in respect of a shipment of 7,350,615 metric tonnes of steam bulk coal ('coal') for a voyage from S Suai, South Kalimantan, Indonesia to Kuching. The insured amount is USD792,000.

[4] The crucial term of the insurance policy for this appeal is that of cl 1 which provides for all risks of loss or damage to the coal.

[5] Prior to the shipment from Indonesia, a survey report was commissioned and the report confirmed that the quality of the coal complied with the specification of the purchase order and that the quantity was 7,350,615 metric tonnes. PT SGS Indonesia did the survey report.

[6] Upon arrival at the Kuching port on 17 April 2010, another survey was commissioned and the report stated that the quality and quantity of the coal were different from that of the report done in Indonesia and hence did not comply with the specification of the purchase order. Particulars of the differences are not disputed and they are as set out in the submission of learned counsel for the appellant:

(a) the total moisture went up from 14.61% to 27.7%;

(b) the ash content went up from 12.49% to 16.7%;

(c) the inherent moisture went up from 5.23% to 6.5%;

(d) the volatile matters went up from 38.5% to 39.4%;

(e) the gross calorific value dipped to 5594 from 6582; and

(f) the weight of the Cargo increased from 7350.615 MT to 7550 MT.

The aforesaid report was done by SGS (M) Sdn Bhd ('SGS').

[7] In view of these differences, the coal had become useless for use to the appellant in that the quality of the coal that had arrived in Kuching was inferior than the specifications stated in the purchase order. The use of the coal by the appellant is for fuel burning at the clinker plant at Mambong without the need of mixing with other coal.

[8] To comply with the terms of the insurance policy for the purpose of making a claim, the appellant on 5 May 2010 lodged a police report of the variance of the two commissioned reports. The appellant also informed the

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respondent on 4 May 2010 of the just mentioned differences of the two reports and also made the claim on the policy. SGS was also informed of the differences.

[9] Upon being informed, SGS did another survey on 5 May 2010 by way of comparison between the two reports and came to this conclusion:

> Based on the above analysis results comparison (mainly TM, GCV, HGI, Ash) indicates the coal inspected during loading at Sg. Salai-Indonesia and the coal inspected during discharge Kuching-Malaysia are of different coal. Also the cargo quantity does not correspond between loadport & discharge port.

[10] The respondent in response to the appellant's claim on the insurance policy commissioned another surveyor by the name of Kasi Marine-Technical Inspection Sdn Bhd on 21 May 2010 which in substance found as follows:

> PROBABLE CAUSE Based on the foregoing, the Insured goods *could have* absorbed moisture at some stage during transit resulting the quality of Insured's goods to be not within Assured's specification. The nature of abovementioned damage is classified as inherent vice.

[11] Premised on that report, the respondent through its broker on 10 June 2010 rejected the appellant's claim on the following ground:

> 'discrepancies in the quality and non-conformity of specifications do not fall within the ambit of the marine cargo insurance policy' and 'the natural ability of coal to absorb moisture from the atmosphere is classified as '*inherent vice*'. As per Exclusion 4.4 of the Institute Cargo Clauses, the policy does not cover loss, damage or expenses caused by inherent vice or nature of the subject matter insured.

[12] The appellant attempted to mitigate the damage by using the coal through mixing the same with other high grade coals but however did not work in that the fuel did not produce enough heat to cook the raw materials. The appellant expended an amount of RM957,713.02 through this attempt to utilise the low grade coal.

[13] The dispute was resolved by the High Court which on 17 August 2012 dismissed the appellant's claim and this appeal concerns that dismissal.

HIGH COURT GROUNDS

[14] The learned judge in our view had framed the determinative issue correctly in this dispute and that was:

> Whether the appellant had discharged the burden of proving that the loss of the coal through the change in quality of the same during the voyage from Indonesia and Kuching is within the confines of the insurance policy?

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[15] It was undisputed by parties that the insurance policy is an 'all risk' policy. The relevant clause reads as follows:

> This insurance covers all risks of loss of or damage to the subject matter insured except as provided in clauses 4, 5, 6 and 7.

[16] Before the learned judge, the respondent's position was basically that even though it is an all risk policy that does not mean it covers any kind of risk. There must be elements of 'fortuity or casualty'. That contention is premised on the dicta found in *British and Foreign Marine Insurance Co v Gaunt* [1921] All ER Rep 447 where the House of Lords state as follows:

> Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty

[17] The appellant took the position that the burden of proof is discharged once it is shown that the loss was caused by a casualty or something accidental or unforeseen without the need to prove the exact nature of the casualty or accident.

[18] The learned judge concurred with the respondent's stand and then discussed in detail whether the appellant had discharged the burden of proving that the loss was due to accident or fortuity. The learned judge found that there was no proof of theft or switching during the voyage on the ground that the amount of transported coal was no small amount. There was also no evidence of bad weather or adverse sea condition which had caused the damage to the coal. Further he also relied on the evidence of PW1 who was not able to say what had caused the change to quality of the coal.

[19] The learned judge's rationale can be seen from this paragraph from his judgment:

> The sea voyage and the loading and unloading were well documented and revealed to be completely uneventful. It is for this reason that the plaintiff is unable to point to any particular event that could have caused the change in specification apart from theorising that the coal could have been switched. However, none of the witnesses who could cast light on the alleged theft such as the seller of the coal or the master of the vessel were called to the witness stand. The plaintiff did not even make a police report alleging theft or switching of coal. The police report only says blandly that the specification of the coal had changed. As the evidence that the journey was uneventful is irrefutable and the plaintiff has not sought to tender evidence to demonstrate otherwise, my opinion is that the plaintiff had not proved that the change in the specification of the coal was due to accident or fortuitous casualty.

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GROUNDS OF APPEAL

[20] In our view the appropriate starting point of deliberation for such claim is the policy cover itself. As pointed out above, the insurance policy is an 'all-risks' policy and what that means in terms of burden of proof is set out in the following cases and commentaries.

[21] In the case of *British and Foreign Marine Insurance Co Ltd v Gaunt* the House of Lords held at p 58 that:

> I think, however, that the quasi-university of the description does affect the onus of proof in one way. The claimant insured against and averring a loss by fire must prove loss by fire, which involves proving that it is not by something else. When he avers loss by some risk coming within 'all risks,' as used in this policy, he need only give evidence reasonably showing that the loss was due to a casualty, not to a certainty or to inherent vice or to wear and tear. That is easily done. I do not think he has to go further and pick out one of the multitude of risks covered, so as to show exactly how his loss was caused. If he did so, he would not bring it any the more within the policy. These considerations answer the appellants' complaint, that the plaintiffs were meagre with their proof. So they were, but it was enough for them to prove some casualty insured against. Rowlatt J, as I venture to think, attached too much importance to the absence of any kind of marine disaster. If the casualty was fortuitous, it needed not to be a calamity.

[22] The same sentiments are reflected in *Law of Marine Insurance* (1996 Ed) — Susan Hodges, where the learned author states:

> One of the main advantages of an 'all risks' cover, as opposed to an enumerated risks policy in the form of the ICC (B) and (C), relates to the important question of proof. In the words of Lord Sumner in *The Gaunt Case*:
>
> > when [the assured] avers loss by some risk coming ; within 'all risks' ... he need only give evidence reasonably showing that the loss was due to a casualty, not to a certainty ... I do not think that he has to go further and pick up one of the multitude of risks covered, so as to show exactly how this loss was caused. If he did so, he would not bring it any the more within the policy.
>
> In similar vein, the Lord Chancellor said:
>
> > ... the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression and he is not bound to go further and prove the exact nature of the accident or casualty which in fact occasioned his loss.
>
> As regards the standard of proof, we are recently reminded by the cause of *Fuerst Day Lawson v Orion Insurance Co Ltd* that the standard is the same as in all civil actions, that of the balance of probabilities.

[23] In *Halsbury's Laws of England* (4th Ed Reissue), Vol 25 at para 150, the

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same sentiments are expressed:

> Onus of proof. The assured must in every case show that the loss comes within the terms of his policy; but where all risks are covered by the policy and not merely risks of a specified class or classes, he discharges the onus when he has proved that the loss was caused by some event covered by the general expression, and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss.

[24] The learned authors in *Marine Policy*, JK Goodacre on *Marine Insurance* at p 123 defined 'all risk' policy as follows:

> Under an 'all risk' cover, the class of perils is so wide that an assured is considered to have discharged his burden of proof by showing that the cause of loss was one insured against, although he is unable to point to a particular cause, provided it has occurred during the currency of the Policy.

[25] Applying the above principle, we are of the considered view that the appellant had discharged the burden of proof and our reasons are these. The comparative analysis performed by SGS, which can be found in pp 204–206 of record of appeal — Part C and the evidence of PW2 were wrongly rejected by the learned judge. The learned judge erred on this rejection as he failed to acknowledge that PW2's evidence is consistent to that of the reports of SGS, which have not been rebutted by the respondent. Further, PW2's evidence was rejected by the learned judge on the ground that he had no academic qualification. That with respect is incorrect as a witness can attain their expertise through his or her experience in that area of expertise. PW2 is a coal mine developer and an international coal trader for some 16 years in Indonesia and Australia. Suffice for us to refer to the dicta contained in the case of *Public Prosecutor v Muhamad Sulaiman* [1982] CLJ (Rep) 292, where the Federal Court held:

> [1] Although the expert (Chemist) must be 'skilled', he need not be so by special study, he may be so by experience; and the fact that he had not acquired his knowledge professionally goes merely to weight and not to admissibility. ... The competency of the expert is a preliminary question for the judge and is one upon which, in practice considerable laxity prevails. Though the expert must be 'skilled'. by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

[26] It is undisputed that the comparative report of SGS and its earlier report on the coal show conclusively that there has been a change in the quality of the coal. This change in quality, and in the absence of any allegations of bad faith or fraud against the appellant in their claim by the respondent, in our view, is enough to show that the loss had been caused by a fortuitous event and/or casualty and/or accident. Hence the appellant had discharged the burden of proof and with that, the burden then shifted to the respondent to prove that the

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change in the quality of coal was due to 'inherent vice' of the coals. In simple language, we found that the appellant had proven their case and to escape liability, the respondent who had asserted that the coal's deterioration was due to 'inherent vice' must bear that burden of proof to so prove, as required under the law.

[27] We are aware of the contention that the change in the quality of the coal could have been caused by absorption of moisture during the journey and that was the 'inherent vice' according to the respondent. This contention was rejected by the learned judge and in our view rightly so. The respondent's witness is not an expert on coal and was only an insurance adjuster. Simply put, the respondent had not produced any evidence to prove their case.

[28] In view of this failure on the part of the respondent, we find that the appellant had successfully proved their claim on a balance of probability and is entitled to compensation due under the insurance policy.

[29] The learned judge though not necessary so to do, had found that damage has been proved and this can be seen in this paragraph of the judgment:

> Counsel for defendant also submitted that the plaintiff failed to prove quantum of loss. His reasons are as follows. He said there is no document to support the claim for USD533,654.65 which is for purchase of the coal. He said that the only invoice to support the claim is dated 10th April 2009. The plaintiff's reply is that it was a typographical error which counsel for defendant says is unacceptable as there were two previous shipments of coal from the same company. In my opinion, there is no merit in the submission of the counsel for defendant. PW1 testified on oath that the expense stated in the said invoice was incurred. He said that the year '2009' in the invoice and should read '2010'. The plaintiff also tendered evidence of payment through their Remittance Application from RHB Bank Berhad for the sum of USD300,000 dated 24th March 2010 and for the sum of USD240,000 dated &n April 2010 exhibited in Pages 1 to 2 of plaintiff's Supplementary Bundle of Documents, Bundle C. In the premises, the testimony of PW1 that the error was purely typographical is likely. Therefore I see no merit in the suggestion that the plaintiff has submitted an invoice that is not related to the purchase order in question.

As rightly pointed out by learned counsel for the appellant, there was no cross-appeal by the respondent, this part of the judgment remained unchallenged. In any event we opined that the learned judge gave a correct analysis of the law and fact on the issue of damage.

[30] During submission, learned counsel for the appellant informed us that he was not pursuing the claim of blending costs of RM957,713.02. That being the case that part of the judgment remained.

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A CONCLUSION

[31] It can be said that this case was resolved by determining who bore the burden of proof and how and when that burden shifted. In this case the appellant bore the primary burden of proving their case that the loss of the coal was due to a fortuitous event and/or accident and/or casualty. The appellant did that by proving that the quality of the coal was not the same as when the coal was boarded in Indonesia. Once proven that burden shifted for the respondent to prove that there was 'inherent vice' in the coal. That the respondent failed to discharge the onus that was on the learned judge. Accordingly and premised on our analysis above, we allowed the appeal. Further we had set aside the judgment of the High Court and awarded damages as in para 13 (i) and (v) of statement of claim, with interest of 5%pa from 7 June 2010 till full payment. We also awarded costs for here and below to the appellant in the sum of RM70,000 and further ordered that the deposit to be refunded to the appellant.

Appeal allowed.

Reported by Afiq Mohamad Noor